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In The

Supreme Court of the United States

October Term, 1973

No. 73- 622

SOL MARGOLIS, ROCCO BISACCIA, EUGENE CIRIELLO, MARIO FELICE, FRANK MUSCENTI and JOHN McCAULEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Page

Petition 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Materials Involved 3

Summary of the Facts 3

Reasons for Granting the Writ 8

I. There was insufficient evidence as a matter of law to bring this case within the purview of 18 U.S.C. Section 1955 since there was no evidence of a gambling enterprise of the "octopus-like" operation contemplated by Congress when it enacted The Organized Crime Control Act of 1970. This case is a striking illustration of blatant encroachment by the Federal Government into purely state jurisdiction. 8

II. The conviction on conspiracy was inconsistent with the charge of sydicated gambling under 18 U.S.C. Section 1955 since concerted action is an indispensable element of the gambling charge. 19

III. The wiretap orders are invalid because the persons whose conversations were to be monitored, and the types of conversations to be seized were not

Contents

Page

described with sufficient particularity. Nor was there a probable cause showing that five or more persons were engaged in the same gambling enterprise. 22

IV. Section 1955 of Title 18 of the United States Code is unconstitutional. 25

Conclusion 29

Appendix A - Order of U.S. Court of Appeals 30

TABLE OF CITATIONS

Cases Cited:

Baker v. United States, 393 F.2d 604 (9th Cir. 1968) . .21

Cummings v. Missouri, 4 Wall. 277, 320 28

Douglas v. City of Jeanette, 319 U.S. 157 27

Drehman v. Stifle, 8 Wall. 595, 601 28

Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 . .18

Gebardi v. United States, 287 U.S. 112 (1932) 21

Kotteakos v. United States, 328 U.S. 750 (1946) 20

Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960) aff'd, 365 U.S. 458 27

Rewis v. United States, 401 U.S. 808 (1971) 15, 18

Reno v. United States, 317 F.2d 499 (5th Cir. 1963) . . .21

Contents

Rovario v. United States, 353 U.S. 53 25

Stefanelli v. Minard, 342 U.S. 117 27

United States v. Altobella, 442 F.2d 310 (7th Cir. 1971) 16, 19

United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940) 15

United States v. Anthony, 145 F.Supp. 323 (M.D. Pa. 1956) 21

United States v. Bass, 404 U.S. 336 (1971) 11, 27

United States v. Becker, 2 Cir. 1972, 461 F.2d 230 .....14, 19, 22

United States v. Borelli, 2 Cir. 1964, 336 F.2d 376, 383, cert. denied, 379 U.S. 960 19

United States v. Brenna, 394 F.2d 151 (2nd Cir. 1968) cert. denied, 393 U.S. 839 17

United States v. Casalinuovo, 350 F.2d 62, (2 Cir. 1971) 20

United States v. Central Veal & Beef Company, 162 F.2d 766 (2d Cir. 1947) 20, 21

United States v. Chamlas, (9th Cir. 1972) 468 F.2d 234 22

United States v. Cogan, 266 F. Supp. 371 (S.D.N.Y. 1969) 21

United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968) 21

Contents

Page

United States v. De Cesaro, E.D. Wis. 1972, 349 F. Supp. 546, 551 ..... 14, 23

United States v. Euphemia, 261 F.2d 441 (2 Cir. 1958) .20

United States v. Fiorella, 2 Cir. 1972, 468 F.2d 688 ..... 14, 19

United States v. Giordano, (March 1973) 22

United States v. Hagan, 27 F. Supp. 814 (W.D. Ky. 1939) 21

United States v. Holte, 236 U.S. 140 (1915) 21

United States v. Kahriger, 345 U.S. 22 at 40 (1953) ... 19

United States v. Katz, 271 U.S. 354, 357 (1926) ... 15, 21

United States v. Lovett, 328 U.S. 303, 322 28

United States v. McCormick, 442 F.2d 316 (7th Cir. 1971) 18

United States v. Miller, 379 F.2d 483 (7th Cir. 1967) 17, 19

United States v. New York Central & H.R.R. Company, 146 F. 298 (Cir. Ct. S.D.N.Y. 1906) 21

United States v. Perez, 402 U.S. 146 ..... 11, 27

United States v. Puntillo, 440 F.2d 540 (7th Cir. 1971) 17

United States v. Rizzo, 418 F.2d 71 (7th Cir. 1969) ... 17

Contents

Page

United States v. Roselli, et al, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 17

United States v. Sager, 49 F.2d 725 (2d Cir. 1931) .20, 21

United States v. Vilhotti, 452 F.2d 1186 (2 Cir. 1971) .20

United States v. Wierzbicki, D.C.E.D. Mich. 9/15/72 12 Cr.L. 2076 .....11, 22

United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943). 20, 21

Yankee Network v. F.C.C., 107 F.2d 212, 219-20 (D.C. Cir. 1939) 15

Younger v. Harris, 401 U.S. 37 10

Statutes Cited:

Title 28 U.S.C. Section 1254(1) 2

Organized Crime Control Act of 1970 .....8, 9, 10, 11

Title 18 U.S.C. Section 1952 .....3, 11, 15, 16, 18

Title 18 U.S.C. Section 1955 ... 2, 3, 8, 15, 19, 23-26, 28

Title 18 U.S.C. 2515 .....3, 22

Title 18 U.S.C. 2516 .....3, 22

Title 18 U.S.C. 2517 .....3, 22

Title 18 U.S.C. 2518 .....3, 23, 24

Title 18 U.S.C. 2518(1)(c) 24

Contents

Page

United States Constitution Cited:

Fifth Amendment **3, 28**

Ninth Amendment **3, 25**

Tenth Amendment **3, 25**

Fourteenth Amendment **3, 28**

Article I, Sections 9, 10 ..... **28**

Other Authorities Cited:

"The Attorney General's Program to Curb Organized Crime and Racketeering," Hearings before Senate Committee on the Judiciary, 87th Cong, 1st Sess. pp. 15-16 (1961) **12, 13**

U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970) **10**

Hearings on "Legislation Relating to Organized Crime" before Sub-Committee No. 5 of House Committee on the Judiciary, 87th Cong. 1st Sess., 1961, p. 336 ..... **13**

S. Rep. No. 644 ..... **12**

H. Rep. No. 966 ..... **13**

107 Cong. Rec. 16542 (1961) **12**

1961 U.S. Code Cong. & Adm. News, p. 2665 ..... **13**

16A C.J.S. Const. Law, Sections 452, 455, "Bill of Attainder" **28**

In The

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No. 73-

SOL MARGOLIS, ROCCO BISACCIA,
EUGENE CIRIELLO, MARIO FELICE,
FRANK MUSCENTI and JOHN McCAULEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that this Court will grant a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit rendered the 10th day of September, 1973, affirming without opinion the judgments of the United States District Court for the Southern District of New York, rendered the 5th day of March, 1973, as to everyone except appellant *Margolis*, and on the 19th day of March, 1973 as to him, convicting each of them of the crimes of violating 18 U.S.C. Section 1955 (organized gambling) and conspiracy to do so, after trial before Frankel, D.J., and a jury.

Each of the petitioners, except *Margolis*, was sentenced to three months imprisonment plus a fine and probation. Petitioner *Margolis* was sentenced to six months imprisonment plus a fine and probation.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals herein.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The Order of the Court of Appeals is dated September 10, 1973.

QUESTIONS PRESENTED

1. Whether Section 1955 of Title 18 of the United States Code is constitutional?

2. Whether federal jurisdiction was properly invoked in view of the fact that the gambling activity herein was purely local in nature and on only one day slightly exceeded $2,000.00 in actual bets. Does the statute, 18 U.S.C. Section 1955, aimed at an "octopus-like" network of organized crime, justify the intervention of the federal government into this purely local activity?

3. Whether the conviction on conspiracy was inconsistent with the charge of organized gambling activity under 18 U.S.C. Section 1955, since concerted action is an indispensable element of the gambling charge, requiring at least five persons to participate jointly therein?

4. Whether the statute authorizing wiretapping, upon which the indictment and conviction herein was primarily based, is constitutional?

5. Whether the statute contemplates that even the most insignificant member of a gambling operation can be deemed to come within the statutory prerequisite of a person "conducting, financing, managing, supervising, directing, or owning an illegal gambling business", or must such person actually be in the higher echelon—that is, in a managerial or supervisory position, to come within the statute?

CONSTITUTIONAL AND STATUTORY MATERIALS INVOLVED

The Fifth, Ninth, Tenth, and Fourteenth Amendments of the United States Constitution are involved herein.

In addition, Sections 1952, 1955, 2515 through 2518, all of Title 18 U.S.C. are also germane.

SUMMARY OF THE FACTS

The gambling activity which is described in the record herein reveals that it is limited to two or three separate gambling operations of a purely intrastate nature with no apparent interstate ramifications. Moreover, the gambling operations are of such a small dimension that it is submitted that the minimum standards of the statute were not even met. It is the position of the petitioners that these minimum standards were not proven. We recognize, however, that a jury verdict was returned against them. Notwithstanding that fact, we would ask this Court to analyze the record carefully to determine whether or not the federal government should even have become involved in this type of local activity. We would ask this Court further to scan the record carefully to convince itself that the minimum requirements were in fact not achieved.

Bearing in mind that at least five or more persons must be engaged in a "*single*" gambling enterprise for a period of at least 30 days duration, or that at least $2,000 has been earned by this *single* gambling enterprise in any one day during the 30 day period, that then, and only then, would possible jurisdiction attach.

In addition, we submit that there must be demonstrated beyond a reasonable doubt that there was in fact a *single* gambling enterprise where five or more people conducted, managed, controlled and so forth, this operation.

Summary of Facts

While the Court below was of the opinion that anyone who is involved in the gambling enterprise, other than a player, was within the purview of the statute, the petitioners take a contrary view and submit that there must be some supervisory or managerial control in order to properly come within the five-man minimum standard which is required for federal jurisdiction.

Congress obviously did not believe that the Government should encroach upon purely State violations of law. The statute herein is designed to combat "octopus-like" organized racketeering type of gambling which has its tenacles spreading from state to state. There is no evidence in this case that this was any sort of gambling enterprise that can be described as an organized racketeering type of operation.

On the contrary, at least two, and perhaps three, separate gambling operations, none of which involves more than three people, was established.

It is the position of the petitioners herein that taking the evidence at its very best for the Government, that petitioners *Felice*, *Muscenti* and *McCauley* may have been engaged in a single gambling enterprise, although there is some doubt even as to that, and *Bisaccia* and *Ciriello* may have been engaged in another separate gambling enterprise. A third possible gambling enterprise might have existed between *Margolis* and *Ciriello*.

There is no tieup between the gambling enterprises of *Felice*, *Muscenti* and *McCauley* and those of *Margolis* and *Ciriello* or of *Bisaccia* and *Ciriello*.

The evidence herein scarcely establishes the very minimum requirements. Without a doubt, the Government failed to prove that the gambling enterprises existed for a 30 day period continuously, or had $2,000 earnings in *one* day.

Summary of Facts

They brought in an expert, Agent Whitcomb, of the Federal Bureau of Investigation, who declared that on a particular day, March 11, 1972, approximately $4,400 was earned. After cross-examination, particularly by defense attorney, Lanna, it became obvious that this agent was lumping together "if" or "contingent" bets and regular bets. "If" bets cannot be cumulative since they are not bets unless certain contingencies occur, in which case the alternative would be eliminated. So, the expert apparently was operating upon a theory which was completely untenable. Even there, the Government maintains that over $2,000 was established, although we maintain that the record leaves substantial doubt that this was in fact the case.

The position of the District Judge that anyone involved in the gambling operation, except a player, no matter how lowly and insignificant his position, came within the statutory definition of "conducting, financing, managing, supervising, directing, or owning an illegal gambling business", was too broad.

The witnesses produced by the Government each revealed that he or she was a small neighborhood better who placed wagers occasionally with *Felice*, or with *Muscenti*, or *McCauley*, at one of two different places; while other of the witnesses stated that they placed bets with *Ciriello* and *Bisaccia* at the Waverly Food Market,—a different place completely,—where *Ciriello* and *Bisaccia* ran a full-time grocery store. None of the witnesses called by the prosecution, in any way, shape, or form, established that petitioner *Margolis* was in any way, shape or form, involved in the taking or accepting of any of the bets of the witnesses. As a matter of fact, no witness was able to identify him.

The evidence as to *Margolis* reveals that on some few occasions he had conversations, only with *Ciriello*, where possibly laying off a bet may have been discussed, or some

other casual information as to the "line" or odds might have been talked about.

There is no tie-in whatsoever between *Margolis* and any of the petitioners, other than *Ciriello*. Even in the case of *Ciriello*, however, the tie-in is obviously not that of a joint business venture, but of one independent gambler, that is *Ciriello*, asking some information of another independent gambler, or in the case of an unusually large bet, perhaps asking if something could be "laid off".

It should be noted that an "unusually large bet" in this enterprise, involving *Ciriello* and perhaps *Bisaccia* was a pittance as to what one might consider an actual large bet.

The operations were of such a small nature that it is difficult to understand how the Government even involved itself in this investigation, and how a Grand Jury even returned an indictment.

It is submitted that the case at bar revealed that the statute has been perverted well beyond the intent of Congress which unquestionably sought to avoid the very thing that happened here; i.e., that a purely local, small gambling enterprise should become the subject of prosecution.

The statute being under the "Organized Crime" sections, was obviously designed to prosecute major syndicated or organized crime type of gambling and not a local neighborhood operation or operations.

Finally, in this Introductory, we submit that an analysis of the record leaves no doubt that the Government failed to prove that five or more people were engaged in a single gambling enterprise.

Summary of Facts

We also submit that since both conspiracy and a violation of Section 1955 were charged, there was a misjoinder of offenses. The Grand Jury concluded that there was a probable violation of Section 1955 which requires the cooperation of five or more persons under certain circumstances. Assuming that those circumstances are proved in the record, a fact which we deny, it is nevertheless obvious that the petitioners could not also be charged with conspiring to violate that Section. Since concert of action is an essential element of the violation of Section 1955, the petitioners cannot be guilty of also conspiring to violate that section which in effect involves exactly the same conduct.

Finally, it should be noted that the proof at trial revealed that no one gambler participated in placing bets with any group consisting of five persons. In other words, where a gambler had placed a bet with *Muscenti* or *Felice* or *McCauley*, that same gambler did not place any bets with *Bisaccia* or *Ciriello*. The converse is also true. No gamblers placed any bets with *Margolis*.

Another aspect of serious error in the record was the permission of the Court to allow the Government to place a diagram on the blackboard showing that a gambler, Joe Tuck, made a telephone call from a public phone booth at Jim's Athletic Club which was operated by *McCauley*, to the Debonaire Social Club where *Felice* sometimes hung out. This telephone call was for the purpose of placing a bet with *Felice*. There was no evidence whatsoever, however, that the making of the telephone call from the public phone booth at Jim's Athletic Club had anything to do with a linkup between the Athletic Club and the Debonaire Social Club. Nevertheless, the Government laid great stress on that fact in order to prove the conjoining of five or more persons in this violation. The Government even saw fit to refer to this in its summation.

It is therefore quite patent that there was insufficient evidence as a matter of law to have warranted the submission of this case to the jury.

REASONS FOR GRANTING THE WRIT

I.

There was insufficient evidence as a matter of law to bring this case within the purview of 18 U.S.C. Section 1955 since there was no evidence of a gambling enterprise of the "octopus-like" operation contemplated by Congress when it enacted The Organized Crime Control Act of 1970. This case is a striking illustration of blatant encroachment by the Federal Government into purely state jurisdiction.

The evidence in this case reveals that only by the most ingenious manipulation of betting information was the Government able, through its expert, to establish that perhaps slightly more than $2,000 was bet on one day by the entire gambling operations of the six people allegedly involved in this case. It was apparent that the expert, Agent Whitcomb, had misconstrued the nature of many of the bets which he interpreted, such as "if" bets, as a result of which even he had to concede that his estimate of $4,400 on the one day where in excess of $2,000 was extrapolated, was grossly excessive.

The point which petitioners wish to drive home, however, is that there was absolutely no evidence at all of an interstate racketeering operation but, on the contrary, all of the witnesses who testified concerning the placing of bets revealed that these were small neighborhood bookmakers who ran a very modest gambling business which cannot in any way, shape, or form be described as a large-scale or "octopus-like" operation.

Reasons for Granting the Writ

This case is a clear example of the encroachment by the Federal authorities into a purely state crime.

It must be remembered that when Congress passed the "Organized Crime Control Act of 1970", it was concerned with organized, large-scale, illegal activities. Congress found that:

> "(1) organized crime is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because the defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily

limited in scope and impact." U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970).

There was no evidence whatsoever against *Sol Margolis* that he in any way participated with any of the petitioners other than *Ciriello*. In the case of *Ciriello* there were desultory telephone conversations concerning possible laying-off of a bet and discussion of odds. There was never any contact between *Margolis* and anyone else charged in the indictment.

The indictment itself charged only six people, one more than the statutory minimum, with a violation of the Organized Crime Control Act. The evidence however, disclosed that *Muscenti*, *Felice* and *McCauley* operated completely separately and apart from *Bisaccia* and *Ciriello*. As a matter of fact there was a serious question whether there was a nexus established among *McCauley*, *Muscenti* and *Felice*. The Court permitted the jurors to "speculate" about this nexus by admitting testimony of a telephone call made from a public pay phone by a player, Tuck, located at Jim's Athletic Club, to *Felice* at the Debonaire Social Club. Since Tuck was not a co-conspirator and the phone used was a public pay phone, this was highly prejudicial.

Ciriello and *Bisaccia* were only part-time bookmakers since they operated a full-time grocery store, the Waverly Food Market. Even the federal surveillance team corroborated this fact.

The United States Supreme Court has held that the federal government should be reluctant to encroach on areas which have traditionally been left to the states (*Younger v. Harris*, 401 U.S. 37).

Frequently, in the past, federal criminal prosecutions have been struck down when proof of a nexus with

interstate commerce has not been established. *(United States v. Bass*, 404 U.S. 336 (1971)).

We are of course aware of *United States v. Perez*, 402 U.S. 146. In the *Perez* case there was a specific Congressional intent to supersede state legislation in a particular field.

In the statute herein involved, however, Congress has not indicated a desire to preempt the field except where there is clear evidence of an "octopus-like operation contemplated" under the Organized Crime Control Act of 1970. There will obviously be a severe taxation of federal police resources if every illegal gambling operation that encompasses five persons, no matter how local in nature, is to be prosecuted by the federal government. (See *United States v. Wicrzbicki*, D.C.E.D. Mich., 9/15/72, 12 Cr.L. 2076.) No inference of preemption of the entire field should be inferred. *(California v. Zook*, 336 U.S. 725, reh. denied 337 U.S. 921 (1949)).

It may be appropriate to consider some legislative history interpreting the analagous sections of the Organized Crime Control Act (18 U.S.C. Section 1952).

Attorney General Kennedy, who sponsored the statute, described the statute's narrow purpose and scope as follows:

> "Mr. Chairman, we have one more bill, S. 1653, which is perhaps the most controversial and certainly one of the most important. *We are seeking to take effective action against the racketeer who conducts an unlawful business, but lives far from the scene in comfort and safety*, as well as against other hoodlums.

Reasons for Granting the Writ

> "*Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill.* We specifically have outlined the illicit operations we seek to curtail as those involving gambling, liquor, narcotics, prostitution businesses or extortion or bribery in violation of State or Federal Law.
>
> "The target clearly is organized crime. *The travel that would be banned is travel in furtherance of a business enterprise which involves gambling, liquor, narcotics, and prostitution offenses, or extortion or bribery.* Obviously, *we are not trying to curtail the sporadic, casual involvement in these offenses but rather a continuous course of conduct sufficient for it to be termed a business enterprise.*" *(The Attorney General's Program to Curb Organized Crime and Racketeering.* Hearings before Senate Committee on the Judiciary, 87th Cong. 1st Sess. pp. 15-16 (1961) (hereinafter "Senate Hearings"), quoted in S. Rep. No. 644, *supra*, p.3)(Emphasis added).

On several occasions, various members of Congress expressed concern as to the possible breadth of the bill's coverage. For example, Senator McClellan and Congressman Harris, in a joint letter, questioned the Attorney General about the possible effect of the bill on otherwise honest businessmen whose activities might touch upon one or more of the "unlawful activities" mentioned. In his reply, the Attorney General interpreted the term "unlawful activity" as used in the bill (107 Cong. Rec. 16542 (1961)).

The Attorney General went on to assure Congress, in the most forceful language, that the bill did not apply to persons, such as the defendants herein, having no connection with *organized* crime:

Reasons for Granting the Writ

> "*American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills.* The only toes tread on here are those of the racketeers and hoodlums" (Senate Hearings, p. 17). (Emphasis added.)

Assistant Attorney General Miller gave a similar explanation of the term "unlawful activity" in his testimony before the House Judiciary Committee:

> "H.R. 6572 bans unlawful businesses — *not incidental illegal acts done in the course of lawful businesses.* Since the bill in addition would require proof of the requisite intent before a violation would be made out, I believe that *the scope of H.R. 6572 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed.*" (Emphasis added.) (Hearings on "Legislation Relating to Organized Crime" before Sub-committee No. 5 of the House Committee on the Judiciary, 87th Cong. 1st Sess., 1961, p. 336.)

The report of the House Judiciary Committee, recommending passage of Section 1952, summarized Attorney General Kennedy's testimony on the scope of Section 1952 and stated in conclusion that (H. Rep. No. 966, *supra*, reprinted at 1961 U.S. Code Cong. and Adm. News, p. 2665):

> "The interstate tentacles of this *octopus* known as 'organized crime' or 'the syndicate' can only be cut by making it a Federal offense *to use the facilities of interstate commerce in carrying on of these nefarious activities.*"

Reasons for Granting the Writ

It should be noted that in the case at bar there were no interstate telephone calls, nor was there any evidence of gambling that occurred outside of a small section of a residential neighborhood in the City of Yonkers. The occasional telephone call between *Ciriello* and *Margolis* did not evidence any large-scale syndicate-type of gambling operations.

In *United States v. Becker*, 2 Cir. 1972, 461 F.2d 230, and *United States v. Fiorella*, 2 Cir. 1972, 468 F.2d 688, the United States Court of Appeals for the Second Circuit upheld convictions for a violation of this section. It is submitted, however, that in those cases there was more evidence of an organized type of gambling operation than in the case at bar.

We recognize *arguendo*, that Congress does have a right to legislate where a true organized crime "octopus-like" operation is involved. The statute was never intended to encompass the small neighborhood gamblers depicted in this case. The Government just about eked out the statutory minimum, although we submit that a perusal of the expert's testimony will cast doubt even upon that accomplishment.

It must be remembered that in the *Becker* case, *supra*, it was conceded that the gambling operation existed for more than thirty days and grossed more than $2,000 daily, the only question there remaining was whether at least five of the seven persons named were conducting an illegal gambling business. (See Appellant's Brief in *Becker*, p. 17.)

We submit that the mere finding that five people were engaged in gambling, does not necessarily mean that they were engaged in the gambling together.

In *United States v. De Cesaro*, E.D. Wis. 1972, 349 F. Supp. 546, 551, the Court aptly explained:

Reasons for Granting the Writ

> "In summary, Section 1955 requires as an element of the offense described therein that five or more persons participate in a gambling business. It is obvious that the statute contemplates that five or more persons join together in some manner in the *same gambling* business in order that that business be declared illegal under the statute." (Emphasis ours.)

There is nothing in the statute itself or in its legislative history to indicate the Congress intended to enact a bill which would bring purely local conduct under federal regulation. Accordingly, under well-established principles, the statute should not be construed to permit such a result. See, e.g., *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940); *United States v. Katz*, *supra*, 271 U.S. 354, 357 (1926); *Yankee Network v. F.C.C.*, 107 F.2d 212, 219-20 (D.C. Cir. 1939), and cases cited therein.

In *Rewis v. United States*, 401 U.S. 808 (1971) the Supreme Court rejected an expensive government interpretation of Section 1952 where the defendants had operated a gambling establishment located in Florida which was frequented by nearby residents of Georgia who travelled interstate for that purpose. The Court observed, "Petitioners are Florida residents and there is no evidence that they at any time crossed state lines in connection with the operation of their lottery" (p. 810). In reversing the convictions, the Court emphasized the intent of Congress to strike at the truly interstate operations of organized crime (p. 811):

> "Legislative history of the Act is limited, but does reveal that Section 1952 was aimed primarily at *organized* crime, and more specifically, *at persons who reside in one State while operating or*

> *managing illegal activities in another*" (emphasis added).

In addition, the Court, "struck by what Congress did not say" (pp. 811-812), refused to give broad application to Section 1952 particularly since Congress gave no indication that it wishes to (p. 812):

> "... alter sensitive federal-state relationships, ... overextend limited federal police resources, ... [or] produce situations in which ... a matter of happenstance, would transform relatively minor state offenses into federal felonies."

It is clear, therefore, that "what Congress did not say," either in Section 1952 itself or in its legislative history, was that an otherwise strictly local crime, wholly lacking in interstate character, can be transformed into a federal felony by means of telephone calls, which were entirely intrastate.

In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971) the Court of Appeals reversed the convictions of two extortioners under 18 U.S.C. Section 1952 where the government claimed federal jurisdiction on the basis that the victim's check had been sent by mail between Chicago and Philadelphia. In so holding the Court states (pp. 314-316):

> "That Congress did not intend to exercise its full constitutional powers in the area of local law enforcement is demonstrated by the working of the Act...
>
> * * *
>
> "To warrant federal intervention we believe the statute requires a more significant use of a facility

of interstate commerce in aid of the defendants' unlawful activity than is reflected on this record. . . (citations omitted).

"Thus, a gambling operation conducted on an interstate carrier, *United States v. Brenna*, 394 F.2d 151 (2nd Cir. 1968) cert. denied, 393 U.S. 839; or by regularly traveling across a state line to obtain essential supplies, *United States v. Puntillo*, 440 F.2d 540 (7th Cir. 1971); the employment of out-of-state specialists in aid of the criminal enterprise, *United States v. Roselli, et al.*, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924; the use of interstate 'credit cards' and mailing lists to attract out-of-state patrons, *United States v. Rizzo*, 418 F.2d 71 (7th Cir. 1969); and the use of a Western Union ticker tape recording information received from out of state as a regular and continuous element of the illegal enterprise, *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967); all provide examples in which federal assistance to local law enforcement is entirely appropriate and clearly contemplated by the history and language of the Travel Act.

"But there is nothing about the appellants' enterprise, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government. The use of the mails by the bank through which appellants' victim's check was cleared, a few days after it had been cashed — was purely incidental to appellants' sordid scheme. Their purpose would have been achieved equally well if the victim had borrowed $100 from associates at the hotel or written a check on a local bank. Moreover, the unlawful activity which followed the cashing of the

check was merely the payment of $50 to Patterson. Unquestionably, the distribution of proceeds of criminal activity may satisfy the 'thereafter' requirement of the statute in a proper case. But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed. Unquestionably, the distribution of proceeds of criminal activity may satisfy the 'thereafter' requirement of the statute in a proper case. But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed.

"Unquestionably appellants' unsuccessful attempt 'to make a fast buck' is punishable as a crime. We merely hold that the State of Illinois is the appropriate sovereign to prosecute their offense. We do not believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. We are guided by the Supreme Court's admonition 'that in ascertaining the scope of Congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background . . .' *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881."

Similarly, in *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971) the Court of Appeals reversed defendants' convictions under 18 U.S.C. Section 1952 of having used the mails to facilitate a lottery forbidden by Indiana law. In so holding, the Court stated (p. 318):

> "Here too the activities engaged in by defendant were essentially local. The role played by the interstate mailings was 'a matter of happenstance' and 'minimal and incidental' to the operation of the illegal lottery. As in *Rewis* and *Altobella*, the interstate activities relied upon by the Government were the acts of others and were not actively sought or made a part of the illegal activity of the accused. There was no showing that defendant's lottery in any way depended upon or included interstate operations. Unlike *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967), defendant neither 'used' nor 'caused to be used' any interstate facility as an instrumental part of his illegal operations. We must therefore conclude that no federal crime was committed, and that the State of Indiana is the only appropriate authority to punish defendant for maintaining this local lottery."

See, also, *United States v. Kahriger*, 345 U.S. 22 at 40 (1953), indicating that a purely local activity ought not come within the purview of federal jurisdiction.

II.

The conviction on conspiracy was inconsistent with the charge of syndicated gambling under 18 U.S.C. Section 1955 since concerted action is an indispensable element of the gambling charge.

We recognize that the Court below has already considered arguments along these lines in *Becker* and *Fiorella*, *supra*.

It is submitted however, that in the case at bar the Court did not charge, as requested, the "chain" and "wheel" conspiracy theories. (See *United States v. Borelli*,

2 Cir. 1964, 336 F.2d 376, 383, cert. denied, 379 U.S. 960, and *Kotteakos v. United States*, 328 U.S. 750 (1946)).

This case is more nearly a case of guilt by conjecture than anything else. There was an utter failure to establish a single conspiracy. The fact that there were two or three neighborhood gambling operations going on at the same time, but completely separately, cannot create a single conspiracy. These people, except for *Margolis*, all lived in the same general neighborhood, but that was the only coincidence. (See *United States v. Vilhotti*, 452 F.2d 1186 (2 Cir. 1971); *United States v. Casalinuovo*, 350 F.2d 62, (2 Cir. 1971); and *United States v. Euphemia*, 261 F.2d 441 (2 Cir. 1958).

Lying uncomfortably close to the borders of due process is the trial court's failure to dismiss the conspiracy charge against the appellants under the ancient rule of the Second Circuit announced in *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943) and *United States v. Sager*, 49 F.2d 725 (2d Cir. 1931). The underlying rationale of these cases was stated in remarkably simple language by the late Judge Learned Hand in *United States v. Central Veal and Beef Company*, 162 F.2d 766 (2d Cir. 1947):

> "What it does mean is that when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicated, they may not be indicted for conspiring to commit it if they have in fact consummated it." (162 F.2d at 770.)

Clearly the petitioners come well within the reach of this rule, for under Section 1955 five or more persons must participate together in an illegal gambling operation. In order for criminal liability to attach under this statute,

they must act in combination and in concert. Thus, the virtue of this rule is that it avoids double punishment when the substantive offense itself contemplates an illegal agreement. The parties who act in concert should not be punished a second time for entering into the very same agreement merely because it is called a conspiracy.

This well-reasoned rule has flourished and has been extended to cases of bribery, *Sager, supra;* rebating or railroad charges, *United States v. New York Central and H.R.R. Company*, 146 F. 298 (Cir. Ct., S.D.N.Y. 1906); criminally receiving stolen property, *United States v. Zeuli, supra;* concealing and harboring fugitives, *United States v. Hagan*, 27 F. Supp. 814 (W.D. Ky. 1939).

This rule was acknowledged by the United States Supreme Court, although not applied, in *Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Katz*, 271 U.S. 354 (1926); and *United States v. Holte*, 236 U.S. 140 (1915).

Of course this principle is inapplicable when the offense can be committed by one of the co-conspirators alone or when those whose cooperation is necessary for commission of the substantive crime conspire with another person to commit the offense.* However, here neither of these exceptions apply and thus it was a cardinal error, reaching due process proportions, for the trial court to compel the petitioners to proceed to trial under both charges.

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*See *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968); *Reno v. United States*, 317 F.2d 499 (5th Cir. 1963); *United States v. Central Veal and Beef Company*, 162 F.2d 766 (2d Cir. 1947); *United States v. Corallo*, 281 F. Supp. 24 (S.D.N.Y. 1968); *United States v. Cogan*, 266 F. Supp. 371 (S.D.N.Y. 1969); *United States v. Anthony*, 145 F. Supp. 323 (M.D. Pa. 1956).

Reasons for Granting the Writ

The prejudice to the petitioners is obvious. Under the conspiracy charge the petitioners were forced to wallow in a sea of evidence channeled into their case through the conspiracy conduit. Whereas had they only been required to go to trial on the substantive offense this flood of evidence could have been stemmed.

III.

The wiretap orders are invalid because the persons whose conversations were to be monitored, and the types of conversations to be seized were not described with sufficient particularity. Nor was there a probable cause showing that five or more persons were engaged in the same gambling enterprise.

There is a possibility that the United States Supreme Court will determine the validity of the statute authorizing electronic inspection of telephone calls under 18 U.S.C. Section 2515 *et seq.*

The Supreme Court has already granted certiorari in *United States v. Giordano*, (March 1973) *supra*, and we believe, in *United States v. Chamlas* (9th Cir. 1972), 468 F.2d 234. We have been advised that no decision on certiorari has been made with respect to *United States v. Becker, supra.*

Suffice it to say however, the statute authorizing electronic surveillance may well be insufficient and unconstitutional.

In *United States v. Wierzbicki, supra*, the Court indicated many of the shortcomings inherent in the statute.

We maintain that in reviewing the affidavits for the search warrants, there is no indication that the

Reasons for Granting the Writ

Government established that five or more persons were engaged in the *same* gambling enterprise.

In addition, the statute, 18 U.S.C. Section 2518, requires that there be a showing that "other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried . . .".

In *United States v. De Cesaro*, *supra*, 349 F. Supp. at 551, the Court summarized the requirements of the statute very aptly as follows:

> "In summary, Section 1955 requires as an element of the offense described therein that five or more persons participate in a gambling business. It is obvious that the statute contemplates that five or more persons join together in some manner in the same gambling business in order that that business be declared illegal under the statute. When the recitations of the affidavit are fully considered together, excluding those that do not satisfy the requirements for consideration in determining probable cause as enunciated in *Aguilar* and *Spinelli*, there is no showing that there is probable cause that five or more of the persons named in paragraph 2 of the affidavit, or others are or were participating together in some manner or other in the same gambling business. The affidavit does not contain a showing of probable cause to believe that Section 1955 is being violated or has been violated, or that there is a conspiracy to violate that section. Suppression of the evidence obtained by the wiretap order must follow.

Sufficiency of the Statement Regarding Other Investigative Procedures

"The statute, 18 U.S.C. Section 2518, requires that the application for a wiretap order contain '. . . a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried . . .'. 18 U.S.C. Section 2518(1)(c). A careful scrutiny of paragraphs 50 and 51 of the affidavit, viewed in light of all other recitations in the affidavit and the known difficulty of investigations of gambling activities lead me to conclude that the application for the wiretap order does meet the statutory requirement.

"For the reasons hereinbefore stated, I conclude that there is an insufficient showing of probable cause to believe that 18 U.S.C. Section 1955 has been, is being, or is about to be violated." (Emphasis ours.)

The eavesdropping warrant which was obtained from Judge Cannella upon the application of Assistant United States Attorney Patrick Burke and Federal Bureau of Investigation Agent Edwin Fraumann, followed the statutory requirements by "rote". There was no sufficient demonstration however that "other investigative means" had been used to any extent before application for the eavesdropping warrant was made. The statute requires that all other investigative methods be explored before resort to the drastic remedy of an invasion of privacy is justified.

Agent Fraumann refers to the alleged fact that an unnamed informer told him that gambling was going on among the petitioners except for *Margolis*. The evidence at trial differed sharply from the statement and affidavit. At trial it was evident that no gambler called by the Government had placed any bets with *Ciriello* at any place other than the Waverly Food Market. Yet, in the affidavit of Agent Fraumann for the eavesdropping order, he alleges

that this unnamed informant declared that he had placed bets with *Ciriello* at the Waverly Food Market and at Jim's Athletic Club. There was absolutely no evidence adduced at trial of this fact.

The unnamed informant was perhaps a device used by the Government to obtain the eavesdropping warrant. Under *Rovario v. United States*, 353 U.S. 53, there should have been disclosure made of the name of this informant. The defense, at the trial, had attacked the sufficiency of the warrants. There was no formal hearing made or conducted on the actual sufficiency of the warrant itself at the trial.

The problem, as is evidenced by this case, is that the Government makes general statements but does not satisfy the statutory requirements as set forth that they had exhausted all other investigative methods, since there is only a token compliance with this aspect.

In addition, Section 1955 of Title 18 of the United States Code requires that there be five or more persons engaged in the *same* gambling operation. The application and the affidavit for the eavesdropping warrant discussed the fact that bets were placed with five of the six petitioners, but do not reveal whether or not they are engaged in the *same* gambling operation. As a matter of fact, different locations are mentioned and the trial evidence would seem to negate the verity of the affidavit of Agent Fraumann.

IV.

Section 1955 of Title 18 of the United States Code is unconstitutional.

Under the Ninth and Tenth Amendments of the United States Constitution, the definition and prosecution

of local intrastate crimes are reserved for the states. Through Section 1955, the federal government attempts to exert jurisdiction over gambling activities, which in the case at bar are purely local and there is no evidence whatsoever that they have an effect upon interstate commerce. There is no indication at all that any calls or other transactions were made outside the State of New York.

We recognize that the Court below has sustained the constitutionality of this Section, but we do not believe that there has been a definitive opinion in the United States Supreme Court on the subject. We maintain that the section is unconstitutional on its face and also as applied in the case at bar.

We have gone into the fact, to some extent, that this was a purely neigborhood, local gambling enterprise conducted on the one hand by *Muscenti* and *McCauley*, and perhaps *Felice*, and on the other hand by *Ciriello* and *Bisaccia*, at a completely different location and under different circumstances. (*Bisaccia* and *Ciriello* conducted a full time grocery while *McCauley* ran a full time Athletic Club, and *Felice* and *Muscenti* frequented the Debonaire Club).

No substantial or even significant amounts of money was bet since the operations were so small and local in nature. No effect of this activity on interstate or foreign commerce is discernable and therefore this case falls outside of that class of conduct which the Congress declared was an "octopus-like" organized type of racketeering.

Moreover, the statute does not require that the "conducting . . . of an illegal gambling business" be wilful or knowing. Thus a person can be found guilty of a federal

felony without knowingly or wilfully committing any of the acts proscribed under the Section. Wilfulness and knowing performance of an act has been the traditional requirement for a federal felony.

The statute is further unconstitutional since it reaches all gambling activity between various persons, regardless of the number of transactions, and irrespective of whether it is inter or intra-state in nature.

For example, if 5 local merchants or ballplayers or the like decided to "book" a single football game and accepted one bet of $2,000, under the Government's theory, they would violate this statute.

The federal courts are opened to a mass of purely local matters that are traditional subjects of state jurisdiction.

In *United States v. Bass, supra*, 404 U.S. 336 (1971), and *United States v. Perez, supra*, 402 U.S. 146 (1971), we have seen that where Congress intends to pre-empt the field, it has no difficulty in making itself clear (e.g., *Perez*).

The general rule inherent in American Federalism is that the federal government ought not interfere with the enforcement of state law over crimes traditionally prosecuted by state courts.

Douglas v. City of Jeanette, 319 U.S. 157; *Stefanelli v. Minard*, 342 U.S. 117; and *Pugach v. Dollinger*, 277 F.2d 739 (2 Cir. 1960), Aff'd 365 U.S. 458.

This statute elevates a state misdemeanor to that of a federal felony without any need to show an impact on interstate commerce or that the activity is co-mingled with interstate transactions.

Reasons for Granting the Writ

The legislative determination, set forth *supra*, only refers to large-scale ("octopus-like") organized racketeering, not local gambling offenses. Virtually every gambling misdemeanor in the country would become subject to federal prosecution if this Court sustains the viability of this case under Section 1955.

It should also be noted that the statute is unconstitutional as it is a Bill of Pains and Penalties under the prohibition of Bill of Attainder provisions of the Constitution (Art. 1, Sections 9, 10, United States Constitution), since it *legislatively presumes* the persons accused of Section 1955 violations to be "guilty!" of the state crime of gambling without any indictment or information or trial.

Cummings v. Missouri, 4 Wall. 277, 320; *United States v. Lovett*, 328 U.S. 303, 322; *Drehman v. Stifle*, 8 Wall. 595, 601; 16A C.J.S. Const. Law, Sections 452, 455, "Bill of Attainder".

The accused is also deprived of due process of law by the fact that a *presumption of guilt* of the state gambling offense is presumed.

This raises the consideration of the denial of equal protection of the laws since persons charged in the state with gambling offenses are entitled to be tried under the safeguards of due process (Fifth and Fourteenth Amendments).

Thus, the statute is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX A – ORDER OF U.S. COURT OF APPEALS

(Dated September 10, 1973)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of September one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

HON. WILFRED FEINBERG

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Sol Margolis, a/k/a "George", Rocco Bisaccia, a/k/a "Rocky", Eugene Ciriello, a/k/a "Blue", Mario Felice, a/k/a "Loaf", Frank Muscenti, a/k/a "Marggie" and John McCauley, 73-1718

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Order of U.S. Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statement	2
Argument	4
Conclusion	14
Appendix A	1a
Appendix B	1b

CITATIONS

Cases:

Berger v. *New York*, 388 U.S. 41	11
Gabardi v. *United States*, 287 U.S. 112	13
Osborn v. *United States*, 385 U.S. 323	11
Palmer v. *United States*, Nos. 71–1596 and 71–1597 (C.A. 6), decided March 31, 1972, certiorari denied, 409 U.S. 874	5, 6
Perez v. *United States*, 402 U.S. 146	4
Rewis v. *United States*, 401 U.S. 808	8
Roviaro v. *United States*, 353 U.S. 53	12, 13
Schneider v. *United States*, 459 F. 2d 540, certiorari denied, 409 U.S. 877	5, 8
United States v. *Bass*, 404 U.S. 336	8
United States v. *Becker*, 461 F. 2d 230	4, 5, 8, 11, 12, 14
United States v. *Cantor*, 328 F. Supp. 561	12
United States v. *Ceraso*, 467 F. 2d 653	5
United States v. *Chalmas*, 468 F. 2d 234	11
United States v. *Cox*, 449 F. 2d 679, certiorari denied, 406 U.S. 934	12

532-357—74——1

Cases—Continued

	Page
United States v. *Cox*, 462 F. 2d 1293	12
United States v. *Dunnings*, 425 F. 2d 836, certiorari denied, 397 U.S. 1002	9
United States v. *Focarile*, 340 F. Supp. 1033	12
United States v. *Gardner*, 436 F. 2d 381	9
United States v. *Giordano*, No. 72–1057, certiorari granted, March 26, 1973	11
United States v. *Harris*, 460 F. 2d 1041	5, 8
United States v. *Hunter*, 478 F. 2d 1019, certiorari denied, No. 73–101, October 9, 1973	14
United States v. *King*, 335 F. Supp. 523	10
United States v. *LaGorga*, 336 F. Supp. 190	12
United States v. *Leta*, 332 F. Supp. 1357	12
United States v. *Mainello*, 345 F. Supp. 863	10
United States v. *Manning*, 448 F. 2d 992, certiorari denied, 404 U.S. 995	9
United States v. *Perillo*, 333 F. Supp. 914	12
United States v. *Riehl*, 460 F. 2d 454	5, 8
United States v. *Scott*, 331 F. Supp. 233	12
United States v. *Sklaroff*, 323 F. Supp. 296	12

Statutes:

84 Stat. 922–923 (Statement of Findings and Purpose of the Organized Crime Control Act of 1970)	5
18 U.S.C. 371	2
18 U.S.C. App. 1202(a)(1)	8
18 U.S.C. 1952	5, 8
18 U.S.C. 1955	1, 2, 4, 5, 6, 7, 8, 11, 13, 14
18 U.S.C. 1955(a)	7
18 U.S.C. 2515–2518	11
18 U.S.C. 2518	10
18 U.S.C. 2518(1)(c)	8

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-622

SOL MARGOLIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The court of appeals wrote no opinion; its order affirming the conviction (Pet. App. A) is reported at 483 F. 2d 1399.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1973. The petition for a writ of certiorari was filed on October 9, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1955 constitutes a valid exercise of congressional power.

2. Whether in this case the government established a violation of Section 1955.

3. Whether the affidavit supporting the application for the wiretap order, or the wiretap order, itself, was invalid.

4. Whether the name of a government informant should have been revealed at trial.

5. Whether the indictment and punishment for violation of both 18 U.S.C. 371 and 1955 was improper.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted on two counts charging that they conducted an illegal gambling business and conspired to do so, in violation of 18 U.S.C. 1955 and 371. Petitioners Ciriello, Bisaccia, Felice, Muscenti and McCauley were sentenced to three months' imprisonment on Count 1 and five years' probation on Count 2, with fines ranging from $500 to $2,000; petitioner Margolis was sentenced to six months' imprisonment on Count 1 and five years' probation on Count 2, with a $10,000 fine. The court of appeals affirmed without opinion (Pet. App. A).

Petitioners operated an unlawful gambling business from three locations in Yonkers, New York. The business was run by Margolis from the back room of a grocery store manned by Ciriello; the grocery was owned and run by Bisaccia. Ciriello, Bisaccia, Felice, Muscenti and McCauley took bets for the business at an athletic club, a social club and the grocery store.

Muscenti, Felice and McCauley accepted bets on sporting events and horse races at the athletic club and the social club. Information on the betting line odds could be obtained and the bets placed on a cash or credit basis with any of the three, but Felice most often paid the winning bettors. Bets on the numbers as well as sporting events and horse races were accepted by Ciriello and Bisaccia on both a cash and credit basis at the grocery store (Tr. 28–105).[1]

Telephone conversations from an unlisted phone at the grocery store and a telephone at the athletic club, recorded pursuant to court authorization during a fourteen day period in March 1972, disclosed the nature and extent of the gambling business. Using the code name "George," Margolis regularly called Ciriello at the grocery to provide and discuss the betting line for the day and receive reports on betting activity. After speaking with Margolis, Ciriello would call Felice, Muscenti, or McCauley to give them the betting odds for the day, so that all outlets of the business would be using the same line. Both Ciriello and Bisaccia used the telephone to give the betting line to, and take bets from, unidentified individuals on numbers, sporting events and horse races. The intercepted calls at the athletic club involved McCauley and Felice giving the line to callers and accepting bets from them. Based upon intercepted telephone calls on two days at these two locations, Special Agent Whitcomb of the Federal Bureau of Investigations calculated that the amount wagered on March 11, 1972, was at least

[1] "Tr." refers to the transcript of the trial proceedings.

$3,300 and the amount wagered on March 18, 1972, was $1,880 (Tr. 259–260, 280–281, 288–328; GX 1–36, 38–39).[2]

The gambling activity at the grocery store was also under visual surveillance. On one occasion, Bisaccia was overheard talking about a numbers bet with an unidentified party in the front of the store. On other occasions, Muscenti was observed in the grocery for approximately eight minutes (Tr. 195–197, 216–223; GX 53).

Gambling records bearing the names of McCauley and Felice and containing the fingerprints of Ciriello were seized at the grocery store when Ciriello was arrested there with $923 in cash in his possession. Records at the grocery store also contained the telephone number and address of Margolis. Similar gambling records, bearing the fingerprints of Muscenti, were found at the social club when Muscenti was arrested there. Based upon the records seized, Agent Whitcomb calculated that the amount wagered that day was $3,700 (Tr. 236–247; GX 1A, 42–52).

ARGUMENT

1. Petitioners contend that 18 U.S.C. 1955 is unconstitutional because it constitutes an impermissible invasion of the powers reserved to the states.

The constitutionality of 18 U.S.C. 1955 has been sustained under principles announced in *Perez* v. *United States*, 402 U.S. 146, by every court of appeals that has considered the issue. See *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for certiorari

[2] "GX" refers to government exhibits at trial.

pending, No. 72–158; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), petition for certiorari pending, No. 72–87; *Palmer* v. *United States*, Nos. 71–1596 and 71–1597 (C.A. 6), decided March 31, 1972, certiorari denied, 409 U.S. 874; *United States* v. *Riehl*, 460 F. 2d 454 (C.A. 3); *Schneider* v. *United States*, 459 F. 2d 540 (C.A. 8), certiorari denied, 409 U.S. 877. These cases stand for the proposition that Section 1955 is within Congress's power under the commerce clause to control intrastate activities affecting interstate commerce and that Congress's findings[3] are adequate to support its conclusion that syndicated gambling provides substantial revenues for organized crime, which in turn affects interstate commerce. There is no reason to depart from that rationale here.

Petitioners argue that 18 U.S.C. 1955 is unconstitutional as a bill of attainder because it substitutes a legislative finding of probable cause for the required judicial finding, and because it includes a violation of state criminal laws as an element of the offense.[4] Simi-

[3] In the Statement of Findings and Purpose made prior to the passage of the Organized Crime Control Act of 1970, Congress declared that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling * * *" (84 Stat. 922–923). Relying upon cases decided under 18 U.S.C. 1952, petitioners also argue that the government must prove an "octopus-like" gambling operation with interstate connections in addition to the statutory elements of the crime. It is settled, however, that no such proof is required under Section 1955. *Becker*, *supra*; *Schneider*, *supra*; *United States* v. *Ceraso*, 467 F. 2d 653 (C.A. 3).

[4] There is no claim here, nor was any made at trial, that the evidence was insufficient to show that the gambling business was in violation of New York law.

lar contentions were fully answered in our brief in opposition in *Palmer* v. *United States*, No. 72–2, October Term, 1972, certiorari denied, 409 U.S. 874, a copy of which we are providing to counsel for petitioners.

2. Petitioners argue that their gambling activities were not part of the single operation involving five or more persons contemplated by Section 1955, but constituted several distinct gambling enterprises.

The evidence clearly established, however, that all of the petitioners were involved in a single gambling operation. The recorded telephone conversations and the testimony of the bettors demonstrated that all the defendants except Margolis were accepting bets at three locations—the grocery store, the athletic club and the social club. The interceptions revealed that Margolis supplied the gambling line to Ciriello at the grocery store, which was owned by Bisaccia, that Ciriello in turn passed it on to Felice, Muscenti and McCauley, and that Margolis and Ciriello were in continuous contact with regard to the gambling business.

Certain intercepted telephone conversations further illustrate the interrelationship of the defendants. On March 10, McCauley told a bettor that he would check with Felice before he accepted a wager. On March 12, Ciriello and Felice, and then Ciriello and Margolis, discussed whether a bettor was entitled to be paid on a particular wager. On March 15, Margolis congratulated Ciriello on "finally" learning the business. On March 18, Bisaccia discussed a problem involving a betting slip with one of the numbers runners, Mar-

garet Twyne. Within twenty minutes, Ciriello directed the manner in which that betting slip was to be handled in a call to Muscenti.

The extent of the gambling activity revealed by the fourteen days of wire interception, together with the testimony of the individual bettors who had been placing bets with petitioners for several years, was more than sufficient to establish that the gambling operation had continued for a period exceeding 30 days, as required by Section 1955. In any event, that element of the crime was fully satisfied by meeting the alternative requirement that the proof show the receipt of $2,000 in a single day. Agent Whitcomb added up the wagers placed over the recorded telephone conversations on March 11, 1972, and found that the total was at least $3,300.

Petitioners further contend that their conduct does not fall within the purview of Section 1955 because "there must be some supervisory or managerial control in order to properly come within the five-man minimum standard which is required for federal jurisdiction" (Pet. 4). However, every court of appeals that has dealt with the question of the scope of the conduct proscribed by Section 1955 has held that the phrase "whoever conducts"[5] includes employees such as "runners," "agents," and clerks.

[5] Section 1955 (a) provides:

> Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

532-357—74——2

See *Becker, supra; Harris, supra; Riehl, supra; Schneider, supra.*[6]

3. Petitioners urge that the affidavit of Agent Fraumann of the F.B.I. (App. A, *infra*) supporting the application for a wire interception order and the order itself were fatally defective, on the ground that the affidavit did not establish probable cause and did not meet the requirements of 18 U.S.C. 2518(1)(c) that it show that other investigative procedures had been tried and had failed.

The Fraumann affidavit based the application for a wire interception order upon information obtained from a reliable informant and corroboration of that information by surveillance and other investigative techniques. The informant had previously provided detailed information on gambling activities over a two year period, which had been corroborated by FBI agents, and in one instance had supplied information which was corroborated by electronic surveillance. The informant stated that he had personally placed bets on the telephone with Felice, McCauley and Muscenti at the athletic club and with Ciriello at the grocery store. He also had observed Bisaccia take bets in the front room of the grocery store, while Ciriello used a tele-

[6] *United States* v. *Bass*, 404 U.S. 336, and *Rewis* v. *United States*, 401 U.S. 808, relied on by petitioners, are inapposite. *Bass* was decided on the basis of an ambiguous reference to interstate commerce in the statute, 18 U.S.C. App. 1202(a)(1). Similarly, in *Rewis*, the question was whether the interstate travel of customers of the gambling establishment satisfied the requirement of 18 U.S.C. 1952 with respect to travel in, or use of a facility in, interstate commerce; it had nothing to do with participation in illegal enterprise under Section 1955.

phone in the back room. The informant reported on a conversation with Felice and Ciriello at which he was told that Muscenti, McCauley and Bisaccia assisted them in the gambling operation. The informant also stated that from personal observations, as well as conversations with Felice and Ciriello, there was wagering in an amount far in excess of $2,000 a day.

While they were receiving this information, FBI surveillance agents observed Ciriello at the grocery store for almost three months and, on one occasion, observed Ciriello in the back room of the store for a five minute period when he received four or five brief telephone calls. They also overheard a conversation between Bisaccia and an unidentified person in the front room of the store regarding a bet on numbers. On one occasion Muscenti was observed visiting the grocery store. FBI investigation also disclosed that the telephone number used by the informant to place bets with Ciriello at the grocery store was unlisted, and that Ciriello, Bisaccia, Felice and Muscenti had been previously arrested for violations of the gambling laws. These circumstances, recited in the Fraumann affidavit, clearly established probable cause for the issuance of the wire interception order. See *United States* v. *Manning,* 448 F. 2d 992 (C.A. 2; en banc), certiorari denied, 404 U.S. 995; *United States* v. *Gardner,* 436 F. 2d 381 (C.A. 2); *United States* v. *Dunnings,* 425 F. 2d 836 (C.A. 2), certiorari denied, 397 U.S. 1002.

The Fraumann affidavit also stated that the informant was unwilling to testify against any of the five

persons because he feared for his personal safety and that surveillance had failed to provide sufficient evidence for a successful prosecution, or to identify all of the participants in the gambling operation and determine the precise manner of its operation. Based on his experience in investigations of gambling offenses, the agent also concluded that the telephones would be an essential feature of this type of gambling operation. The trial court's decision to uphold the sufficiency of the affidavit under Section 2518(1)(c) was thus proper. See *United States* v. *Mainello*, 345 F. Supp. 863 (E.D. N.Y.); *United States* v. *King*, 335 F. Supp. 523 (S.D. Cal.).

Petitioners also contend that the wire interception order was invalid "because the persons whose conversations were to be monitored, and the types of conversations to be seized were not described with sufficient particularity" (Pet. 22).[7] The language of the order clearly refutes that contention (App. B, *infra*). Five of the six petitioners were named in the order. All known persons were identified to the greatest extent possible.

The type of conversation to be intercepted was limited by the terms of the order to conversations con-

[7] 18 U.S.C. 2518 provides in part:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known, whose communications are to be intercepted.

* * * * *

"(c) a particular descriptiono f the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;"

* * * * *

cerning violations of 18 U.S.C. 1955. This was further clarified by the court's statement of the objectives to be achieved, *i.e.*, the manner of the individuals' participation, identities of confederates, places of operation, and nature of the conspiracy. The court also ordered that, prior to the interception, physical surveillance must establish the presence of the named subjects; that interception should be discontinued when none of the named subjects was a party to the conversations; that interception should begin as soon as practicable and terminate "upon attainment of the authorized objective or, in any event, at the end of fifteen (15) days"; and that reports on the progress that "has been made toward achievement of the authorized objective and the need for continued interception" should be made to the court on the fifth and tenth days following the date of the order. This was the greatest degree of particularity possible with respect to the type of communications and satisfied the particularity requirement. See *Berger* v. *New York*, 388 U.S. 41, 57; *Osborn* v. *United States*, 385 U.S. 323, 330.

Although petitioners assert that 19 U.S.C. 2515–2518 are unconstitutional, they do not present argument on the issue or even specify the provisions of the constitution allegedly violated.[8] We note that the consti-

[8] Petitioners contend that the issue is already before this Court in *United States* v. *Giordano*, certiorari granted, March 26, 1973, No. 72–1057; *United States* v. *Chalmas*, 468 F. 2d 234 (C.A. 9); and *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for certiorari pending, No. 72–158. Petitioners are incorrect. The constitutionality of 18 U.S.C. 2515–2518 is not at issue in *Giordano* or *Becker*, and certiorari has not been sought in *Chalmas*.

tutionality of the statute has been repeatedly and consistently upheld. See, *e.g.*, *United States* v. *Cox*, 462 F. 2d 1293 (C.A. 8); *United States* v. *Becker*, *supra*; *United States* v. *Cox*, 449 F. 2d 679 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *Forcarile*, 340 F. Supp. 1033 (D. Md.); *United States* v. *LaGorga*, 336 F. Supp. 190 (W.D. Pa.); *United States* v. *Perillo*, 333 F. Supp. 914 (D. Del.); *United States* v. *Leta*, 332 F. Supp. 1357, 1359–1361 (M.D. Pa.); *United States* v. *Scott*, 331 F. Supp. 233, 238–241 (D. D.C.); *United States* v. *Cantor*, 328 F. Supp. 561 (E.D. Pa.); *United States* v. *Sklaroff*, 323 F. Supp. 296 (S.D. Fla.).

4. Relying on *Roviaro* v. *United States*, 353 U.S. 53, petitioners argue that the identity of the informant upon whom the government relied in obtaining the wire interception order should have been disclosed at trial. Although this Court in *Roviaro* declared that there was "no fixed rule with respect to disclosure" and that the "problem is one that calls for balancing" (353 U.S. at 62), petitioners do not indicate the manner and the extent to which their case was prejudiced by non-disclosure. On the other hand, the reasons for non-disclosure of the informant's identity are well established in the record. Fraumann's affidavit asserted that the informant was unwilling to testify because he feared for his personal safety.

Moreover, *Roviaro* is clearly distinguishable. There, "the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify

or contradict the testimony of government witnesses. Moreover, a government witness testified that Doe [informer] denied knowing petitioner or ever having seen him before." *Roviaro, supra,* 353 U.S. at 64–65. Here, the informer's testimony is not important to the defense. Unlike the situation in *Roviaro,* the informer here did not play a central or even a significant role in the criminal activity. In fact, there is no reason to believe (nor is one alleged) that testimony by the informer would have shed any further light on the case.

5. Petitioners contend that they were improperly indicted and convicted for conspiracy to violate 18 U.S.C. 1955, since concerted action by five persons is an element of the substantive offense.* In our response in *Iannelli* v. *United States,* No. 73–64, we pointed out that since the substantive offense may be committed without a conspiracy being formed (*i.e.,* by a single gambling operator who used four or more innocent persons to collect receipts), each offense involves an element not required by the other, and it is therefore proper to charge and punish each separately. Here, as in *Iannelli,* the indictment charged that more than the five persons necessary to constitute the substantive of-

*This contention is known as "Wharton's Rule." It has been described as follows:

> "[W]here it is impossible under any circumstances to commit the substantive offense without cooperative action, the preliminary agreement between the same parties to commit the offense is not an indictable conspiracy either at common law * * * or under the federal statute." [*Gabardi* v. *United States,* 287 U.S. 112, 122.]

fense were also involved in a conspiracy. Thus, "Wharton's rule" should not apply in any event. See *United States* v. *Becker, supra.*

In *Iannelli* and other cases we recognized, however, that there is a conflict between the circuits on this issue. In *United States* v. *Hunter,* 478 F. 2d 1019, certiorari denied, No. 73-101, October 9, 1973, the Seventh Circuit declined to follow the decision in *Becker* and reversed a conviction for conspiracy to violate 18 U.S.C. 1955. We acquiesced in the granting of certiorari in *Iannelli* because of the conflict in the circuits and the significance of this issue to the interpretation of 18 U.S.C. 1955. Since the identical issue is before this Court in *Iannelli,* the Court may wish to defer disposition of the instant case pending disposition of *Iannelli.*

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied, or, in the alternative, that disposition of the petition be deferred pending disposition of *Iannelli.*

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1974.

APPENDIX A

United States District Court, Southern District of New York

IN THE MATTER OF THE APPLICATION OF THE UNITED STATES OF AMERICA FOR AN ORDER AUTHORIZING THE INTERCEPTION OF WIRE COMMUNICATIONS

Edwin H. Fraumann, Special Agent, Federal Bureau of Investigation, New York, New York, being duly sworn, states:

1. I am an "investigative or law enforcement officer . . . of the United States" within the meaning of Section 2510(7) of Title 18, United States Code—that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

2. This affidavit seeks authorization to intercept wire communications concerning an offense involving a violation of Section 1955, Title 18, United States Code and a conspiracy to violate that statute which has been and is being committed by EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY MC CAULEY and others as yet unknown.

3. I have supervised the investigation of the offense and as a result of my present participation in this investigation and of reports made to me by agents under my direction, I am familiar with all circumstances of the offense. On the basis of that familiar-

ity, I allege the facts contained in the numbered paragraphs below to show that:

a. There is probably cause for belief that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, JOHNNY MC CAULEY, FRANK MUSCENTI and others presently unknown, have been and are now committing offenses involving an illegal gambling business which has a gross revenue in excess of $2,000 in a single day, with intent to carry on the offense of wagering on sports events and horse races in violation of New York State Penal Law, Section 225.10, and are, thereby, in violation of Section 1955 of Title 18, United States Code.

b. There is probable cause for belief that evidence of this offense will be obtained through the interceptions of wire communications, authorization for said interceptions being herein applied for;

c. Normal investigative procedures reasonably appear unlikely to succeed;

d. There is probably cause for belief that the telephones bearing the following numbers have been used, are being used and will be used in carrying out the offenses mentioned in paragraph 3(a) above, all of which appears more fully hereafter:

(914) 476-5926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York.

(914) 969-8401, a semi-public, coin-operated telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

The records of the New York Telephone Company as checked on February 15, 1972, reveal that the telephone number (914) 969-8401 is a semi-public, coin operated telephone listed to Jim's Athletic Club, 163 Willow Street, Yonkers, New York. They advised the telephone bills are sent to and paid by GEORGE

MC CAULEY, 163 Willow Street, Yonkers, New York.

On February 22, 1972, the Yonkers Police Department check revealed there was nothing in their records on GEORGE MC CAULEY.

The records of Consolidated Edison were checked on February 15, 1972, and reveal that Mr. GEORGE MC CAULEY pays their bills for Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

The records of the New York Telephone Company, checked on February 15, 1972, reveal that the telephone number (914) 476-5926 is a touch non-listed phone subscribed to the Waverly Food Market, 177 Waverly Street, Yonkers, New York. The telephone bills are sent to and paid by ROCCO BISACCIA, 177 Waverly Street, Yonkers, New York.

On February 23, 1972, a check was made of the Index of Assumed Business Names at White Plains, New York, which reflected the filing on June 7, 1956, of certificate dated May 15, 1956, by ROCCO BISACCIA of 16 Sprain Place, that he was conducting business under the name Waverly Food Market.

FACTS AND CIRCUMSTANCES

4. From experience in the investigation of gambling offenses, I know that a sizable bookmaking operation utilizes telephones for the purpose of conveying gambling information, i.e., the bets from the bettor to the bookmaker. Telephones are also utilized by the bookmaker for the purpose of obtaining race results and sports scores. The bookmaker also must balance his books, that is, he retains bets only in the same approximate amounts on all participants in athletic events or horse races to avoid suffering losses.

5. In order to balance his books, the large-scale bookmaker must reinsure himself when he takes bets

on a favorite in excess of those placed on the remainder of participants in the contest by betting the heavily played item again with another bookmaker who is capable of accepting these bets. This operation is known as a "lay-off" and the bookmaker accepting these bets is known as a "lay-off man."

6. Information from a confidential informant of the Federal Bureau of Investigation and independent by Special Agents of the Federal Bureau of Investigation reveal as set forth in the following paragraphs that: EUGENE CIRIELLO and MARIO FELICE are active participants in a gambling enterprise in the Westchester County area of New York State, which gambling enterprise involves wagers on sports events, horse races and policy (numbers) betting. This gambling enterprise has several focal points where bets are received by CIRIELLO and FELICE and their assistants, both directly and over the telephone. These locations include the following:

> The Waverly Food Market, 177 Waverly Street, Yonkers, New York, and Jim's Athletic Club, 163 Willow Street, Yonkers, New York;

that FRANK MUSCENTI and JOHNNY MC CAULEY work as active bookmakers on CIRIELLO and FELICE'S behalf, at Jim's Athletic Club, where they accept policy (numbers) wagers;

that ROCCO BISACCIA works for CIRIELLO and FELICE at the Waverly Food Market by maintaining the appearance of an active food market, when actually the location's main business is that of accepting wagers on sporting events and horse races, and by receiving wagers on behalf of CIRIELLO and FELICE at that location. BISACCIA also acts as a "lookout" for the gambling operation.

7. A confidential informant of the Federal Bureau of Investigation who has been contacted on a regular

basis for the past two years, has furnished the Federal Bureau of investigation with detailed, reliable information concerning gambling activities. All prior information concerning gambling activities supplied by this informant has been corroborated by Special Agents of the Federal Bureau of Investigation, and informants information has previously led to a successful court-authorized electronic surveillance in a gambling operation.

This informant has been a bettor on horse races and sporting events for several years and this informant has personally placed bets as recently as February 23, 1972, with both FELICE, telephone (914) 969-8401 and CIRIELLO, telephone number (914) 476-5926. This informant described EUGENE CIRIELLO as five feet ten inches tall, 175 pounds, white race, male. Informant estimated his age as about 54 years. Informant stated CIRIELLO works in the back room of the Waverly Food Market. This same informant described MARIO FELICE as about 57 years old, white race, dark complexion, approximately five feet six inches tall, weighing about 195 pounds. During the past year, this informant has placed wagers both directly in the Waverly Food Market and Jim's Athletic Club by telephonically calling the Waverly Food Market over telephone number (914) 476-5926, or Jim's Athletic Club over telephone number (914) 969-8401.

8. On January 24, 1972, and on February 23, 1972, this same confidential informant stated that EUGENE CIRIELLO maintains a sports gambling operation which has numerous runners and that MARIO FELICE handles the numbers operation. This information has been told to the informant by EUGENE CIRIELLO and MARIO FELICE during the month of December 7, 1971, and he has continued to be in con-

tact with them and this information is current as of February 23, 1972. In addition, the informant has observed EUGENE CIRIELLO and MARIO FELICE in the conduct of their gambling operations from December, 1971 up to and including February 23, 1972, on a weekly basis. Also, EUGENE CIRIELLO and MARIO FELICE stated to the informant during December, 1971, that they are helped in the running of their operation by FRANK MUSCENTI, JOHNNY MC CAULEY and ROCCO BISACCIA.

9. This informant stated that he knows that EUGENE CIRIELLO's and MARIO FELICE's gambling operation include the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and Jim's Athletic Club, 163 Willow Street, Yonkers, New York, through conversations he has had with CIRIELLO and FELICE and others who are known to him as bettors during January and the first week of February, 1972.

10. During the course of the past two months, this same informant states he has placed bets in the Waverly Food Market and Jim's Athletic Club over the telephone, by calling (914) 476–5926 and (914) 969–8401. As recently as the week of February 23, 1972, this informant has placed bets by calling (914) 476–5926 and (914) 969-8401. On each occasion, on (914) 476–5926, he would speak to EUGENE CIRIELLO. On each occasion that he would call (914) 969–8401, he would speak to MARIO FELICE, JOHN MC CAULEY or FRANK MUSCENTI.

11. On November 29, 1971, two Special Agents of the Federal Bureau of Investigation observed an individual come into the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and tell the man behind the counter, later identified as ROCCO BISACCIA, "the telephone number was no good

over 'Thanksgiving' ". "I'm throwing the numbers into the basket". BISACCIA attempted to stop the individual from talking about a telephone number while the agents were in the store.

At the same time that the agents were in the Waverly Food Market, they observed EUGENE CIRIELLO in the back room of the store near a telephone. During the five minutes the agents were in the store, they observed CIRIELLO receive four or five very brief phone calls.

12. Surveillances were conducted on the Waverly Food Market between November 17, 1971, through February 3, 1972, at which times EUGENE CIRIELLO was observed at the Waverly Food Market at various times between the hours of 12:00 Noon and 5:00 P.M.

During observations and conversations with EUGENE CIRIELLO during the period between December 16, 1971, and February 23, 1972, and by placing bets with EUGENE CIRIELLO between December 16, 1971, and February 23, 1972, the confidential informant advised that ROCCO BISACCIA runs the Waverly Food Market in the front room, checking on who comes into the store; and that EUGENE CIRIELLO is in the back room handling sports action over the phone (914) 476-5926 (non-listed). The confidential informant advised that the pay phone in the front room has an extension under the counter and is the listed phone for the Waverly Food Store, but that the gambling action is not taken over this phone.

On February 23, 1972, informant advised thru observations by him during the period from December, 1971 to February 23, 1972 he has observed that BISACCIA handles any bets placed by "walk in bettors" that come into his establishment and that

BISACCIA handles the phone if CIRIELLO has left the premises.

In addition, this same confidential informant advised that EUGENE CIRIELLO is involved with MARIO FELICE and shares a sports and numbers betting operation which from confidential informant's own observation and conversations with the principals handle in excess of $15,000 a day.

14. On November 11, 1971, FRANK MUSCENTI was observed by a Special Agent of the Federal Bureau of Investigation while on a day time photographic surveillance entering and leaving the Waverly Food Market.

15. Records of the Yonkers Police Department reveal that EUGENE CIRIELLO has two arrests, on April 18, 1964 and December 12, 1965, for bookmaking and possession of policy wagering material, and that at this same date, ROCCO MAURICE BISACCIA was arrested for keeping a gambling and betting establishment. FRANK MUSCENTI was charged with the possession of policy slips on September 9, 1965. On January 28, 1963, and September 9, 1965, MARIO JAMES FELICE was arrested for possession of bookmaking records and operating and possession of policy slips. On February 22, 1972, a Yonkers Police Department records check on both JOHNNY MC CAULEY and GEORGE MC CAULEY revealed there were no criminal records on either.

NEED FOR INTERCEPTION

16. The above mentioned informant has stated that he is unwilling to testify against EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY MC CAULEY and others who operate or bankroll the bookmaking oper-

ations at the Waverly Food Market and Jim's Athletic Club, for fear of his personal safety.

Surveillance has been utilized but has failed to provide evidence of the offense sufficient to convict the participants, the identities of all conspirators or the precise manner of operation. This is a result of the secrecy surrounding the operation and the fact that most transactions appear to be made over the telephone.

17. For the reasons set forth in above paragraphs, all normal avenues of investigation and prosecution are closed and the only reasonable way to develop necessary evidence of a violation of federal gambling statutes by EUGENE CIRIELLO, MARIO FELICE, JOHNNY MC CAULEY, FRANK MUSCENTI, ROCCO BISACCIA and others from their base of operations is to intercept wire communications concerning their bets, "lay-off bets" and settlements made by gamblers and/or accomplices to and from telephone number (914) 969-8401 and (914) 476-5926.

18. No other application for authorization to intercept wire or oral communications from the above described persons, places or facilities is known to have been made.

19. Inasmuch as the gambling operation described herein is a continuing criminal conspiracy, the evidence sought through the interception of wire communications to and from telephone numbers (914) 969-8401 and (914) 476-5926 will be obtained on a continuing basis on several days succeeding the first reception of communications which is the subject of the request. It is requested, therefore, that these interceptions not cease after sought communications are first obtained, but that the interceptions continue until communications are obtained which reveal the full

and complete identities of all co-conspirators, the manner in which these conspirators participate in illegal gambling business and the full identities of their confederates, their places and methods of operation and the nature of the conspiracy involved therein or in to terminate fifteen days from the date of this order, whichever is earlier.

Section 803 of Title 18, entitled "Syndicated Gambling of the Organized Crime Control Act of 1970", Public Law 91–452, 91st Congress, approved October 15, 1970, amended Chapter 95, Title 18, United States Code, by adding a new section, Section 1955, Prohibition of Illegal Gambling Business. Section 801 of Title VIII of the act contains special findings that illegal gambling involves widespread use of and has an effect upon interstate commerce and the facilities thereof.

Wherefore, I submit that information supplied by reliable informants, by surveillances, and other records set forth in the preceding paragraphs provide sufficient evidence to establish probably cause that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI JOHNNY MC CAULEY and others as yet unknown, are now committing an offense involving telephone numbers (914) 969–8401 and (914) 476–5926, which are part of a gambling operation in violation of Section 1955, Title 18, United States Code.

EDWIN H. FRAUMANN,
Special Agent,
Federal Bureau of Investigation.

Subscribed and sworn to before
me this ____ day of _____, 1972.

APPENDIX B

United States District Court, Southern District of New York

In the Matter of the Application of the United States for an Order Authorizing the Interception of Wire Communications

ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

To: Special Agents of the Federal Bureau of Investigation, United States Department of Justice

Application under oath having been made before me by Patrick T. Burke, an attorney with the Organized Crime and Racketeering Section of the United States Department of Justice, and an "investigative or law enforcement officer" as defined in Section 2510(7) of Title 18, United States Code, for an order authorizing the interception of wire communications pursuant to Section 2518 of Title 18, United States Code, and full consideration having been given to the matters set forth therein, the court finds:

(a) there is probable cause to believe that EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown, have committed and are committing offenses listed in Section 2516 of Title 18, United States Code, involving the carrying on of an illegal gambling business by five or more persons, which illegal gambling business has a gross revenue in excess of $2,000 in a single

day, in violation of Title 18, United States Code, Section 1955 and are conspiring to commit such an offense in violation of Section 371 of Title 18, United States Code.

(b) there is probable cause to believe that particular wire communications concerning these offenses will be obtained through the interception, authorization for which is herewith applied. In particular, these wire communications will concern the transmission of gambling information relating to wagering on sports events and horse races and policy (numbers) the dissemination of such information to persons engaged in the unlawful business of gambling, and the participants in the commission of the above described offenses.

(c) normal investigative procedures reasonably appear to be unlikely to succeed.

(d) there is probable cause to believe that the telephones (914) 476–5926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and (914) 969–8401, a telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York, have been and are being used by EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown in connection with the Commission of the above described offenses.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Henry Petersen, who has been specially designated in this proceeding by the Acting Attorney General of the United States, the Honorable Richard G. Kleindienst, to exercise the powers conferred on the

Attorney General by Section 2516 of Title 18, United States Code, to:

(a) intercept wire communications of EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown concerning the above described offenses to and from the telephones (914) 476–6926, a telephone located in the Waverly Food Market, 177 Waverly Street, Yonkers, New York, and (914) 969–8401, a telephone located in Jim's Athletic Club, 163 Willow Street, Yonkers, New York.

(b) such interception shall not automatically terminate when the type of communications described above in paragraph (b) has first been obtained, but shall continue until communications are intercepted which reveal the manner in which EUGENE CIRIELLO, ROCCO BISACCIA, MARIO FELICE, FRANK MUSCENTI, JOHNNY McCAULEY and others as yet unknown participate in the illegal gambling business by five or more persons, which illegal gambling business has a gross revenue in excess of $2,000 in a single day, and which reveal the identities of their confederates, their places of operation and the nature of the conspiracy involved therein within the time restrictions ordered below, or for a period of fifteen (15) days from the date of this order, whichever is earlier.

PROVIDED THAT, these interceptions over telephone (914) 969–8401 shall be limited to times during which it has been established by physical surveillance by Special Agents of the Federal Bureau of Investigation, that one or more of the aforementioned individuals is present in the premises where the telephone facility in use is located. And, that any interception shall be discontinued immediately upon the determination by voice identification or otherwise that

none of the named subjects is a party to the conversation.

PROVIDING ALSO THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this order and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or, in any event, at the end of fifteen (15) days from the date of this order.

PROVIDING ALSO, that Patrick T. Burke shall provide the court with a report on the 5th and 10th day following the date of this order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

IT IS FURTHER ORDERED THAT the New York Telephone Company, a communications common carrier as defined in Section 2510(10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier is according the persons whose communications are to be intercepted, the furnishing of which facilities or technical assistance by the New York Telephone Company to be compensated for by the application at the prevailing rates.

Dated: New York, New York.

/s/ CAUELLA,
U.S. District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1974